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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO.

* * *

JOLENE GUSTAFSON,

Petitioner

V.

BOARD OF GOVERNORS, FEDERAL RESERVE SYSTEM, et al.,

Respondents

* * *

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

Prof. Colin K. Kaufman
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(512) 492-4909
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ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED:

I. Whether Petitioner was given due process of law.

A. Whether Administrative Agencies are exempt from the due process clause.

B. Whether the right to notice is waived by failure to appear.

C. Whether Federal Register Notice is all due process requires.

D. Whether combining Federal Register Notice with agency adjudication acentuates due process protection.

E. Whether Petitioner's property was taken.

II. Whether the Board and the Court below erred in denying Petitioner's claim she had standing under Whitney Nat'l Bk. v. Bank of New Orleans.

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CERTIFICATE OF INTERESTED PERSONS:

So Judges may disqualify or recuse themselves, counsel certifies the following persons are interested in the outcome:

Jolene Gustafson, Petitioner

Board of Governors, Federal Reserve System, Respondent Raymondville State Bancshares, Inc., Intervenor and its shareholders, and its five principals, vix.:

John Calkins, Jack Funk, Ralph W. Hutchins, Charles B. Scott and James Whitfield

Raymondville State Bank, and its former shareholders.

Colin K. Kaufman
Petitioner's Attorney
of Record

OPINIONS BELOW:

The opinion of the Board of Governors is not reported, and is attached in Appendix I. The panel opinion of the Fifth Circuit is reported at 717 F.2d 242, and is attached in Appendix II. The opinion denying rehearing and rehearing en banc is reported at 720 F.2d 1291 (1983), and is attached in Appendix III.

JURISDICTION:

The panel decision of the United States Court of Appeals for the Fifth Circuit was entered on October 17, 1983. The decision denying rehearing and rehearing in banc was entered on November 17, 1983. The Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED:

I. Whether Petitioner was given due process of law.

A. Whether Administrative Agencies are exempt from the due process clause.

B. Whether the right to notice is waived by failure to appear.

C. Whether Federal Register Notice is all due process requires.

D. Whether combining Federal Register Notice with agency adjudication acentuates due process protection.

E. Whether Petitioner's property was taken.

II. Whether the Board and the Court below erred in denying Petitioner's claim she had standing under Whitney Nat'l Bk. v. Bank of New Orleans.

STATUTES, REGULATIONS, AND CONSTITUTIONAL PROVISIONS INVOLVED:

United States Constitution, Amendment V: CAPITAL CRIMES: DOUBLE JEOPARDY: SELF-INCRIMINATION: DUE PROCESS: JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

44 U.S.C. §1508: Publication in Federal Register as notice of hearing

A notice of hearing or of opportunity to be heard, required or authorized to be given by an Act of Congress, or which may otherwise properly be given, shall be deemed to have been given to all persons residing within the States of the Union and the District of Columbia, except in cases where notice by publication is insufficient in law, when the notice is published in the Federal Register at such a time that the period between the publication and the date fixed in the notice for the hearing or for the termination of the opportunity to be heard is:

(1) not less than the time specifically prescribed for the publication of the notice by the appropriate Act of Congress; or

(2) not less than fifteen days when time for publication is not specifically preserved by the Act, without prejudice, however, to the effectiveness of a notice of less than fifteen days where the shorter period is reasonable.

12 C.F.R. §226.3(e): Applications

(e) Submission of comments and requests for hearing. The Board will consider a comment or request for hearing with respect to an applicaiton only if it is in writing and is sent to the Secretary of the Board or the appropriate Federal Reserve Bank on or before the date prescribed in the FEDERAL REGISTER notice with respect to applications filed under sections 3 or 4 of the bank Holding Company Act or, in the case of other applications, the date specified in the newspaper notice with respect to such applications, or where no such date is prescribed, on or before the 13th day after the date such notice is first published. Similarly, the Board will consider comments on an application from the Attorney General or a banking supervisory authority to which notification of receipt of an application has been given, only if such comment is received by the Secretary of the Board within 30 days of the date of the letter giving such notification. Any comment on an application that requests a hearing must include

a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing. In every case where a timely comment or request for hearing is received as provided herein, a copy of such comment or request shall be forwarded promptly to the applicant for its response. The Board will consider the applicant's response only if it is in writing and sent to the Secretary of the Board on or before the 10th day after the date of the letter by which it is forwarded to the applicant. At the same time it transmits its response to the Board, the applicant should transmit a copy of its response to the person or supervisory authority making such comment or requesting a hearing. Notwithstanding the foregoing, the Board may, in it sole discretion and without notifying the parties, take into consideration the substance of comments with respect to an application, (but not requests for hearing) that are not received within the time period provided herein.

12 C.F.R. § 265.3: Review of action at delegated level.

Any action taken at a delegated level shall be subject to review by the Board only if such review is requested by a member of the Board either on the member's own initiative or on the basis of a petition for review by any person claiming to be adversely affected by the

action. Any such petition for review must be received by the Secretary of the Board not later than the fifth day after the date of such action. Notice of any such review shall be given to the person with respect to whom such action was taken and be received by such person not later than the close of the tenth day following the date of such action. Upon receipt of such notice, such person shall not proceed further in reliance upon such action until such person is notified of the outcome of review thereof.

STATEMENT OF THE CASE:

Substantively, this is a breach of fiduciary duty and seizure of corporate opportunity case. Petitioner's closest business advisor and four other directors of her bank decided to make a tender offer for its shares to benefit themselves alone, set up a bank holding company which would assume all their debt, mortgage the bank to pay for the tendered shares, and exclude her and the other non-director shareholders from their scheme. The Board of Governors of the Federal Reserve System rejected Petitioner's claim that this violated state and federal law. The Fifth Circuit refused to reach this issue, saying Petitioner lacked standing to raise it.

Procedurally, this is a notice case. Because the Board approved the transaction, under Whitney National Bank v. Bank of New Orleans, 379 U.S. 411, 85

S.Ct. 551, 13 L.Ed.2d 386 (1965), and its progeny, Petitioner apparently lost all right to complain of this wrong in state or federal court. Petitioner has always asserted, and it has never been denied, that the five directors deliberately agreed to keep notice from her lest she demand in on or oppose their deal. They were successful in keeping her from acquiring knowledge of their application to the Federal Reserve System until after the Federal Reserve Bank of Dallas approved it. The Fifth Circuit said this success in concealing the transaction from her destroyed her right to complain. The Fifth Circuit also held she needed no notice because there was publication in the Federal Register. The Fifth Circuit also said she needed no notice because it decided (wrongly and without support in the record) that anyway Petitioner had experienced counsel who could have

protected her rights.

ARGUMENT

I. CITIZENS ARE CONSTITUTIONALLY ENTITLED TO NOTICE BEFORE THEIR PROPEPTY CAN BE TAKEN.

A. Administrative Agencies Are Not Exempt From Due Process.

The opinion below says, in note 5:

> Citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), and its progeny, the competitors asserted that notice by publication was deficient as to known adverse parties. In summarily disposing of this assertion, the Tenth Circuit reasoned:
>
> > Mullane holds that due process requires notice which is calculated to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. This was publication in a local newspaper of a notice to settle accounts in an estate matter. Other cases are cited [pertaining to direct deprivations of tangible property]* * *but none* * * are in point either since they do not involve

> publication in the Federal Register and are not concerned with administrative proceedings.
> Bank of Commerce v. Board of Governors, 513 F.2d at 166 (footnotes omitted). We concur in this reasoning* * *.

But nothing in Mullane suggests that its rule is limited to courts. Mullane does not say that administrative agencies, alone among all organs of government, need not afford citizens due process. And if the Tenth Circuit opinion had really rested on the basis that property can be taken in administrative proceedings without affording due process, it would have been as wrong as the court below was. Every law student in America is taught the contrary. It was established in Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418, 10 S.Ct. 702, 33 L.Ed. 970 (1890) (the "Minnesota rate case") that administrative agencies are subject to requirements

of due process. The only exception to an unbroken line of Supreme Court decisions to this effect was overruled in Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Recent authority does not support the view that administrative agencies have greater powers to cut off rights of citizens than courts do. Instead, recent authority suggests some forms of adjudication of rights may only be entrusted to Article III courts, with their safeguards of life tenure and Senate confirmation. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

B. Failure to Appear Does Not Waive a Right to Notice.

IGNORANCE IS KNOWLEDGE. The view of "notice" taken by the opinion below could best be described as Kafkaesque or Orwellian. The court said Petitioner

could only complain of lack of notice if she appeared before the Board before it made a decision. Obviously she could not appear before the board unless she had notice. How could she know to appear without it? If she already knew, notice would be excused, and no constitutional problems would be presented. First Natl. Bank of St. Charles v. Board of Governors, 509 F.2d 1004 (8th Cir. 1975) is just such a case. And there was actual knowledge in Bank of Commerce itself, too. Petitioner never argued that the Constitution requires useless notices. But the opinion of the court below in effect says, NOBODY IS ENTITLED TO NOTICE UNLESS HE DOESN'T NEED IT. Catch 22. Petitioner submits that the Constitution is not to be so lightly made sport with, as the opinion below suggests.

The opinion below claims Petitioner was "represented by counsel familiar with

the administrative mechanisms * * **". Evidently the court thought Petitioner's son-in-law was working for her at the time, and so should have investigated to see what the bank directors were doing. The record does not support this. No counsel for any party ever argued it. It is not true and it was not the Fifth Circuit's job to make this determination. If it thought that additional grounds were needed to support the decision of the administrative agency, it should have remanded for more findings, not make up facts out of the whole cloth. Camp v. Pitts, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.3d 106 (1973). Petitioner did not tell the Board why she could not use her son-in-law's services for the six months prior to the Board's decisions because her opponents knew the truth, and she thought it was none of the Board's business. She did not want to put her

family troubles on the public record. She did not think the Federal Reserve Board needed to hear or would be interested in a story out of Ordinary People or Terms of Endearment. She did not think that she had to explain why she chose to rely on someone she thought she could trust instead of using her son-in-law as her counsel. fn

fn If Petitioner had known that it was a necessary part of her case, she could have proven the following facts:

1. A week or so after the daughter and son-in-law were down in the Rio Grande Valley talking to bank director Jack Funk about her mother's farming interests, and discussing her interest in the bank, they took a vacation cruise to Alaska.

2. Her daughter suffered respiratory collapse in Fairbanks. Since childhood polio reduced her breathing capacity to 25% of normal under the best of circumstances, her condition was grave. Since the only respiratory specialist in Fairbanks was out of town for a few days and after an incident in which she would have died but for her husband's staying in the room with her, the family decided to bring her home.

3. Jack Funk arranged for the family to charter a jet ambulance to

fly her home. She became comatose during the flight. She stopped breathing again when being taken out of the ambulance on the trip from the airport to the hospital in San Antonio.

4. The first time her husband left her side her pulse rate and respiratory rate increased significantly, and her condition deteriorated. So for months Petitioner's son-in-law never thereafter left her except to go to the law school to teach and immediately come back to the hospital. He showered in her room and slept in the chair by her bed holding her hand.

5. Although, to the great surprise of the doctors and hospital personnel, Petitioner's daughter was able to come home before Christmas, she was still on oxygen and unable to walk, sit up, or otherwise care for herself. Petitioner's son-in-law had someone stay with her when he was in class. Even when Petitioner told her son-in-law that Jack Funk and the other directors were taking over the bank and including her out, she was unable to sit up or walk.

6. If Petitioner had known that her daughter would suddenly worsen and die five weeks after she told her son-in-law about the faithlessness of the directors, she would not have used him as counsel despite the potentially million-dollar-plus loss she had suffered because of the directors' actions.

Under the facts well known to the director-applicants, it is nonsense to say that Petitioner should have relied on her son-in-law (though he concededly teaches banking law, and could have found out the truth immediately if she had asked him to check up on what the five directors were doing at the bank). She had every reason to rely on Jack Funk and the other four directors, instead of her son-in-law. And this truth was known to the five directors, since Jack Funk had even helped with the medical arrangements. (It was also common knowledge at

---

Many other facts might also show the Fifth Circuit was wrong to say petitioner had counsel. They have been omitted as unnecessary.

Counsel must say that the family greatly resents the way the Fifth Circuit opinion conditions Petitioner's right to a million dollar cause of action on giving up their right to privacy. These things should be no business of the courts whatsoever. Petitioner should have been protected from mentioning them by the record evidence saying only that she acquired counsel on February 27.

the St. Mary's Law School, known to its recent graduates who were clerking at the Fifth Circuit at the very time of oral argument below). If the court below was determined to find its own facts instead of reviewing the record before the Federal Reserve Board, at least it had an obligation to find that black is black, instead of finding that black is white.

The case for requiring actual notice to petitioner is many times stronger here than it was in Mullane. In Mullane, the persons not getting notice probably did not oppose the decision requested. At least, nobody knew if they did. Here the week before her daughter's collapse forced him to stop working for her, Petitioner's son-in-law told Jack Funk the bank should carry out a similar plan, the difference (giving all shareholders the same choice as the directors) reflecting the requirements of Jones v. H.

F. Ahmanson & Co., 1 Cal.3d 93, 81 Cal. Rptr. 592, 460 P.2d 464 (1969) (Traynor, C.J.). R., 197. (Of course, he was not told that the five directors had at that point already hired attorneys and filed applications to do it differently.) They knew she wanted in. They knew her son-in-law had told Jack Funk the law entitled her to equal treatment. The bank had her financial statements, and they knew she could afford to fight. She was the one person in the world they would choose not to tell. So they chose not to. R., 197-98, 201. And they have never denied it. The panel decision's position is that directors can ask the government to get somebody, and that person is entitled to no notice, though the decision will absolutely bind her and she will get no other forum.

In effect, the opinion below asserts that for constitutional purposes, BEING

DEFRAUDED OUT OF NOTICE IS THE SAME THING AS WAIVING IT. That is not the law. An actual intent is needed before federal courts recognize waivers of even non-constitutional rights. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-14, 92 S.Ct. 1907, 32 L.Ed.2d 313 (1972). Absent waiver, a powerful governmental interest is needed to avoid due process rights. See also In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring); see also Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1946) and cf. Manges v. Camp, 494 F.2d 97 (5th Cir. 1973) (Morgan, Cir. J.). The need to prevent runs on a bank has been held sufficient, In re American City Bk. & Tr. Co., N.A., 402 F.Supp. 1229 (ED Wis. 1975), quoting In re Franklin Natl. Bk., 381 F.Supp. 1390 (ED N.Y. 1974), quoting Slay v. Berry, 27 Mich. App. 271, 183 N.W.2d 436

(1970); quoting Fahey v. Mallonee, above. But nobody claims notifying Petitioner would hurt the bank, as distinguished from the five directors and their plan.

Mullane, supra, says an adverse party's rights cannot be adjudicated without actual notice where her name and address are known. To comply with Mullane the Board's application forms should have included the following two sentences:

"1. List any shareholders you know would fight losing their shares if they knew your plan: _____.

"2. Tell them what you plan to do."

C. Federal Register Notice is Not Due Process Notice.

The opinion below is the first to say that Federal Register notice is enough to take a citizen's property. It says property can be taken by an

administrative agency without Mullane due process notice, provided Federal Register notice was given. The Tenth Circuit never said that. The Tenth Circuit opinion dealt with rights to notice asserted by mere competitors:

> An important difference to be noted between the case at bar and the cases relied on by appellants is that the cases cited have to do with direct deprivations of property. Ours does not." (distinguishing Mullane).

Bank of Commerce v. Board of Governors, 513 F.2d 164, 167 (10th Cir. 1973). Petitioner is not a mere competitor. She complains of the loss of her shares in the bank. She should have been told before her rights in those shares were adversely "adjudicated."

The panel opinion says that 44 U.S.C. §1508 (shown by typographical error in the opinion as §1058) requires its result. One could understand if that were true, since the statute was passed

in 1935, long before Mullane. But it is not. As old as the statute is, it expressly (and unmentioned by the opinion below) says that the Federal Register is notice "except where otherwise required by law." (Emphasis added.) So it did not intend to destroy constitutional protection of property rights. It never said the government could take property without consent and without notice.

D. Combining Federal Register "Notice" with Administrative Agency Adjudication Changes Nothing.

Perhaps note 5 of the panel decision just meant to assert that the combination of the administrative agency with the particular form of constructive "notice" requires a different result from either ingredient taken alone.

If so, why?

A bureaucratic agency is probably the least responsive institution of

government to the constitutional rights and the interests of the general public. Cf. § 559C, Corbin on Contracts (C. Kaufman Supp. 1984) ("one cannot automatically assume that the existence of a bureaucratic entity means that the interests of the consumer will be vigorously represented"). As shown above, Federal Register notice is probably the least effective form of constructive notice that could be devised to protect ordinary citizens. Why should combining the most dangerous form of government with the least effective form of protection suddenly destroy citizens' constitutional right to actual notice when they and their addresses are known?

The construction placed on 44 U.S.C. § 1508 by the opinion below makes this statute unconstitutional. To be sure, Congress can constitutionally limit the rights of mere competitors to Federal

Register notice. After all, the Court pointed out in Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (Stewart, J.), that a "mere subjective 'expectancy'" is not protected by procedural due process. Competitors have no constitutional right to be protected against competition. Our laws favor competition, not bureaucratic gamesmanship to suppress it. United States v. Philadelphia Natl. Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963); United States v. Marine Bancorp, 418 U.S. 602, 94 S.Ct. 2856, 41 L.Ed.2d 978 (1974) (Powell, J.). But Petitioner had a constitutionally protected property right in her shares and her right to sue her directors for breach of fiduciary duty and conversion of a corporate opportunity. Under Mullane, the construction put on the Federal Register Act by the opinion below makes it

unconstitutional.

Holding that the Federal Register Act constitutionally makes Federal Register notice sufficient to take property from citizens, the Fifth Circuit has created all the constitutional justification anyone needs to create a totalitarian dictatorship. Jolene Gustafson's bank shares were as much her property as her house, her car, her farms. If Federal Register notice is all that the Constitution requires to satisfy due process to take property, then why could not a government as easily take a citizen's car, house, children, or life by announcing in the Federal Register that an administrative agency was going to decide some issue, and have a rule that anyone who did not appear (before it made a decision) lost all his rights. That is exactly the rationale of the decision below.

If the directors had tried to go to court to take Petitioner's shares in the bank, they would have had to give her actual notice. But they went to an administrative agency whose decision (as shown under part E below) is made legally of the same effect as a decision of a court. The panel decision effectively says that the constitutional rights stated in Mullane v. Central Hanover Bank, 339 U.S. 306 (1950) simply do not protect citizens from administrative actions. Except for the potential barrier of Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., supra, one would have predicted that someday all governmental decisions will be made by administrative agencies (This may still happen). If agencies only have to put a general, and incomprehensible notice in the Federal Register to do anything they want to people, constitutional guarantees

protect nothing at all.

The court below had no difficulty finding a statute unconstitutional for taking control incidents of share ownership away from a convicted criminal in Manges v. Camp, 474 F.2d 97 (5th Cir. 1973) (Petitioner's counsel has always taught that this case went too far, since conviction of a crime authorizes losses of constitutional rights; but Petitioner committed no crime in trusting Jack Funk.) Is it reasonable that in the Fifth Circuit convicted criminals have greater rights to keep their bank stock than victims of breach of fiduciary duty and of breach of the corporate opportunity doctrine? Why is the due process clause not even implicated when the government says faithless directors can take potentially (by counsel's calculations) a million dollars from an honest citizen? Do only criminals have

constitutional rights?

Perhaps the court below could properly have said that "Federal Register" notice is all that the constitution requires for proposed rule-making, though agency adjudication can still require due process notice. Cf. e.g. Ind. Bkrs. Assn. of Ga. v. Bd. of Govs., 516 F.2d 1206, 1214-16 (D.C. Cir. 1975); and Aris Gloves, Inc. v. United States, 281 F.2d 954 (Cus. & Pat. Apps. 1958), cert. denied 368 U.S. 954, interpreting the predecessor to current 44 U.S.C. §1508. The panel decision does not say this.

Perhaps the panel decision thinks mere property rights are not worth protecting. Perhaps the author of this opinion agrees with the sign in the movie, Reds, that "Property is theft." But that is not the theory of the Constitution. And until the constitution is changed, private property cannot be taken

by the government except within due process limits.

E. Petitioner's Property Was "Taken".

Petitioner not only lost her shares in the tender-offer and bank-holding-company-debt-assumption deal approved by the Federal Reserve Board; arguably she also lost her right to complain of the illegality of the action anywhere else.

In Whitney Natl. Bank v. Bank of New Orleans, 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed.2d 836 (1965) the court said:

> "We believe Congress intended the statutory proceedings before the Board to be the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested. Admittedly the acquisition of an existing bank is exclusively within the jurisdiction of the Board." 379 U.S. 411, 419.

Following the logic of this passage, most state courts say that someone like

Petitioner has no remedy under state law if the Federal Reserve Board rules against her. And the State Banking Commissioner has already ruled in connected proceedings (added to the record below) that he lacks jurisdiction to give Petitioner any relief, though arguably he said so because the state statute is too narrow to allow any state agency supervisory powers over this kind of problem. This passage from Neally v. Brown, 284 A.2d 480 (Me. 1971) fully represents the view of Whitney that Federal Reserve Board adjudications are conclusive:

> "If the Maine Bank Commissioner were allowed to make a final decision, reviewable, through the State Courts of Maine, on the questions above delineated and in which are intermixed both the federal and state laws--thereby to deny original existence as a corporate body to a new trust company under a plan of organization and operation involving ownership or control of the new trust company by a bank holding company--the Federal Reserve Board would be deprived entirely of the opportunity and power to evaluate

> and decide the issue. Thus the command of the Congress would be completely frustrated. (379 U.S. p. 423, 85 S.Ct. p. 559). It was precisely to prevent such likelihood that the court in Whitney held the function and jurisdiction of the Federal Reserve Board in the premises to be both original and exclusive." 284 A.2d 480, 488.

Similar language and reasoning can be found in Central Bank of Clayton v. State Banking Board, 509 S.W.2d 175 (Mo. App. 1974). See also Banking Board v. Columbine State Bank, 569 P.2d 871, 874 (Colo. 1977) where the court said, citing Whitney, "Acquisition of an existing bank by a bank holding company is exclusively within the jurisdiction of the Federal Reserve Board." (Emphasis in original). The language of First Natl. Bank of St. Charles v. Board of Governors, 509 F.2d 1004 (8th Cir. 1975) and Bank of Commerce v. Board of Governors, 513 F.2d 164 (10th Cir. 1975), followed by the opinion below, is on its face consistent with

this interpretation. And even later Supreme Court cases may have contributed to this impression, as in Board of Governors v. First Lincolnwood Corp., 439 U.S. 234, 250, 99 S.Ct. 505, 58 L.Ed.2d 484 (1978), where the court said, "Indeed, our decision in Whitney Natl. Bank v. Bank of New Orleans, 379 U.S. 411 (1965), indicates that the Board's jurisdiction is paramount." However, the court below did not formally adopt this view. The opinion said it would "express no opinion" on whether Petitioner could have any state remedies after its decision came down.

Petitioner had asked the court below not to follow these cases but to follow In re Cleveland Trust Co., 38 Ohio St.2d 183, 311 N.E.2d 854 (1974), and rule that even if her property was taken, still she had her state law remedies to get it back. Petitioner had pointed out to the

Fifth Circuit that its decision would be binding on the state, under the converse rule to the Erie doctrine: Just as federal courts must follow state court interpretations of state law; state courts must follow federal court interpretations of federal law. Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967) (Brennan, J.). If the court below had done so, Petitioner's loss of her property might yet be reversible. And the thrust of judicial doctrines like abstention suggest that Petitioner was entitled to have the federal forum (the Fifth Circuit) decide this question in the first instance. The Fifth Circuit abused its discretion in forcing Petitioner to slink off to Texas authorities for relief, to ask them to decide federal law issues in the first instance, there to make the Cleveland Trust argument against the weight of

American authority and in the teeth of the Fifth Circuit's approving citation of cases seemingly following the opposite rule. Petitioner submits that this majority (and apparently Fifth Circuit) view of the exclusivity of the Federal Reserve Board's powers gives this administrative agency authority which it may not constitutionally exercise, since it has usurped the functions of an Article III court, Northern Pipeline Constr. Co. v. Marathon Pipe Line Corp., supra; and since it does not give due process notice, as discussed above.

Since she had no other remedy or forum for relief whatsoever, the Board took her property when it approved the taking of her shares in Raymondville State Bank. This could not constitutionally be done.

II. PETITIONER HAS STANDING TO COMPLAIN OF THE VIOLATION OF HER RIGHTS.

Petitioner took great care to make a timely appearance before the administrative agency, despite the concealment of the directors. She had five days after the Federal Reserve Bank of Dallas approval to appeal to the whole Federal Reserve Board, and she did so within the five days. 12 C.F.R. § 265.3. Thus she did exhaust her administrative remedies, though the court below refused to discuss this viewpoint, either in the panel opinion, or after the motion for rehearing.

Saturday, February 26, 1982, the day after the Federal reserve Bank of Dallas approved their application to make a tender offer for the rest of the shares and to set up a holding company to mortgage the shares to a Houston bank to pay for the directors' costs of

acquisition, Jack Funk told Petitioner she would not get equal treatment with the directors. R., 191. Immediately thereafter she called her son-in-law who was then teaching Banking Law at St. Mary's University. R., 202.

On Monday, her son-in-law discovered the application had been granted. R., 198. Realizing that under the procedure allowed in Whitney Natl. Bk. v. Bank of New Orleans, 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed.2d 386 (1965), Petitioner had five days from the decision to appear before the Board and seek review, he sent a petition that evening and it was filed the next day, Tuesday, March 2, four days after the decision. R., 197-98.

The Bank Holding Company Act permits petitions for review of Board actions only within 30 days after the decision complained of. So Petitioner petitioned the Fifth Circuit on March 26, in No.

82-4113, for review of the February 26 approval seeking a stay April 15. This was granted by a three-judge panel, but after Petitioner moved to enlarge the stay, the panel vacated it. In May, the Board denied Petitioner's petition for review of the Federal Reserve Bank of Dallas decision, by the opinion found in Appendix I. Again in order to be sure of meeting the 30 day time limit, she sought review of this later decision in the Fifth Circuit in No. 82-4213; and the two cases were consolidated. Argument before a panel with two new members in March, 1983, produced the October 17 decision found in Appendix II, written by the judge who sat on both panels. Petitioner moved for rehearing and rehearing en banc, which was denied in November in the decision reproduced in Appendix III.

When the opinion below said Petitioner lost her rights because the five

directors successfully concealed the truth from her until after the Board actually granted approval to their scheme, op., p. 327; it cited 12 C.F.R. §262.3(e), which relates to people who do not appear before the Board at all. The opinion did not even cite 12 C.F.R. § 265.3 discussed by Petitioner by which people can seek review before the Board for five days. Both sections are entirely consistent. Both let her appear after a Federal Reserve Bank decision is announced and within the five days before it is final. The Fifth Circuit opinion took §262.3 in isolation and did not mention §265.3.

In Whitney, the Supreme Court remanded with instructions to allow the Board to consider the contentions of the objecting bank. It did not instruct the Fifth Circuit to dismiss because the competitor did not appear before the

Board until the decision had been announced. The banking bar has relied on the procedure implicitly approved of in Whitney for nearly two decades. The Fifth Circuit did not explain what is wrong with Whitney. The Fifth Circuit did not explain how this case is different than Whitney. Justice demands that like cases be treated like. Kaufman, THE SCIENTIFIC METHOD IN LEGAL THOUGHT: LEGAL REALISM AND THE FOURTEEN PRINCIPLES OF JUSTICE, 12 ST. MARY'S L.J. 77, 101 (1980) (9th principle of justice). Courts need a reason to let one person to do something and not let another. Without any reason, there is no law, only the dictator's fiat. §536 (B), Corbin on Contracts (C. Kaufman Supp. 1982).

The Fifth Circuit decision did not say that Whitney was obsolete, or should be overruled, or that the regulatons have changed (they have not, in relevant

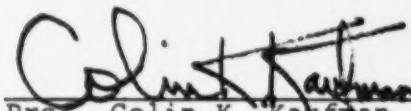
part), or anything at all on this point. This silence does not enlighten the banking bar. One can only suspect that the Fifth Circuit disregarded its duty to stare decisis, and its obligation to follow the lead of the Supreme Court. The Fifth Circuit cannot lawfully refuse to follow the Supreme Court's decision in Whitney making her an "aggrieved" party, without explaining how the Supreme Court erred.

CONCLUSION:

The Fifth Circuit should be reversed. This Court should remand with instructions that the Fifth Circuit recognize that she is a "party aggrieved", and that it review on the merits whether Texas law recognizes the corporate opportunity doctrine or whether instead it permits directors to set up bank holding companies to mortgage their

banks for their own personal profit without any fiduciary duty to remaining shareholders.

Respectfully submitted,



Prof. Colin K. Kaufman
14311 Hill Prince
San Antonio, Texas 78248

(512) 492-4909
(512) 436-7143

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed on the 13th day of February, 1984, and an additional three copies were mailed on this 14th day of March, 1984 to the following parties at the addresses shown:

Secretary,
Board of Governors of the
Federal Reserve System
20th Street and Constitution
Avenue N.W.
Washington, D.C. 20551

Office of General Counsel
Board of Governors of the
Federal Reserve System
20th Street and Constitution
Avenue N.W.
Washington, D.C. 20551

Mr. Robert D. Hankins,
Director of Applications
Federal Reserve Bank of Dallas
400 South Akard Street
(Station K)
Dallas, Texas 75222

Mr. Charles L. Greef
Jenkens & Gilchrist
2200 First National Bank Bldg.
Dallas, Texas 75202

Colin K. Kaufman

APPENDIX I

[Letterhead of Board of Governors
of the Federal Reserve System]

May 10, 1982

REGISTERED
RETURN RECEIPT REQUESTED

Colin Kaufman, Esq.
13727 Castle Grove
San Antonio, Texas 78231

Dear Mr. Kaufman:

This is to advise you that the Board today has denied the petition, dated March 1, 1982, of Ms. Jolene Gustafson ("Petitioner") requesting that the Board review the Federal Reserve Bank of Dallas's approval under delegated authority of the application of Raymondville State Bancshares, Inc., Raymondville, Texas ("Applicant"), to become a bank holding company by acquiring the Raymondville State Bank, Raymondville, Texas ("Bank"). The Board has also denied Petitioner's request for

a stay of the Reserve Bank's approval pending judicial review.

The Board has considered Petitioner's request for review of the Reserve Bank's approval of the application under delegated authority and determined, based on all of the relevant facts, that the request for review should be denied. The subject application was accepted by the Reserve Bank for processing under delegated authority on January 14, 1982. In accordance with section 262.3(i) of the Board's regulations, 12. C.F.R. § 262.3(i), notice of the application was published in the Federal Register and in the local paper in Raymondville for comment on January 29, 1982, and November 12 and 19, 1981, respectively. The application was approved by the Reserve Bank on February 26, 1982. No comments on the application were filed with the Board or

Reserve Bank prior to approval. Under its regulations, the Board is not required to consider objections to a proposal that are submitted after approval of the application. 12 C.F.R. § 262.3(e). Therefore, the Board is not required to consider Petitioner's comments since they were not submitted within the comment period prescribed in the notices or during the pendancy of the application before the Reserve Bank. Petitioner apparently contends that the newspaper and Federal Register notices were insufficient in the facts of this case, because the principals of Applicant and Bank (hereinafter referred to as "Principals") deliberately concealed the filing of the application from her, despite her expressions of interest in the formation of a holding company.

One court has determined that publication in the Federal Register of a notice of a bank holding company application is legally sufficient and the comment period prescribed in that notice is binding on the public, at least where the party that had failed to protest in a timely manner had actual notice that an application would at some time be filed. Bank of Commerce v. Board of Governors, 513 F.2d 164, 166-67 (10th Cir. 1975). It is apparently Petitioner's theory that she reasonably expected to be advised of the filing of the application by one of Principals, with whom she had cooperated in other business ventures, but that he failed to do so. There are facts in the record, however, indicating that there may have been some duty on Petitioner's part to discover the status of the proposal through her own actions. For example,

Applicant notes that the existence of a proposed tender offer by Principals for Bank's shares, which is an integral part of the holding company formation and to which Petitioner strongly objects, was disclosed at Bank's annual shareholder's meeting on January 28, 1982, almost a month before the application was approved. It appears, therefore, that the disclosure of the tender offer plans should have put Petitioner on notice that an application would be filed in the near future and that Petitioner has no compelling excuse for failing to protest within the comment period.

In any event, Petitioner's claims on the merits have been examined in connection with her request for a stay of the Reserve Bank's approval, and, as explained below, have been determined to be without merit and do not warrant

reversal of the delegated approval or Board review of such action.

In addition, Petitioner's request for stay of the approval order pending judicial review is denied because Petitioner has failed to establish the grounds necessary for the granting of a stay. Specifically, Petitioner has failed to demonstrate that she is likely to prevail on the merits of her claims, that a refusal to grant a stay would result in irreparable injury to her and that a stay would not substantially harm the other interested parties and would serve the public interest.

Petitioner's arguments in opposition to the application do not demonstrate a strong showing that she is likely to prevail on the merits. Indeed these arguments are without merit. Petitioner's principal argument is that principals of Applicant and Bank

("Principals") breached their fiduciary duty to the minority shareholders of Bank by failing to provide the minority shareholders with an equal opportunity to participate in the formation of a holding company.

There are limits on the extent to which the Board, in passing on a holding company application, may resolve complaints by minority shareholders against the management of a banking organization. See Western Bancshares, Inc. v. Board of Governors, 480 F.2d 749 (10th Cir. 1973). Remedies for victimized minority shareholders are ordinarily provided under state law. The Board may consider as a part of the managerial resources of a proposal, however, any conduct by managerial personnel toward minority shareholders

that reflects adversely on the integrity of management.[1/]

The transaction set forth in the application provides that Principals will make a tender offer to purchase all of the remaining outstanding shares of Bank at a price of $100 per share.[2/] Thereafter, Bank will be merged into an interim bank wholly owned by Applicant. Pursuant to the merger agreement, each shareholder of Bank (Principals as well as minority shareholders who have not tendered their shares) will receive shares of Applicant equal to the number of shares held in Bank and will receive

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1/ See Benson Bancshares, Inc., 63 Federal Reserve Bulletin 1009 (1977).

2/ The Board has been advised that the FDIC has taken the position that a notice under the Change in Bank Control Act is not required with respect to the shares of Bank acquired by Principals pursuant to the tender offer.

$70 per share in assumption of indebtedness or in Applicant's debentures.

Petitioner's complaint focuses on the fact that by virtue of their tender offer Principals will likely control a larger share of Applicant than they now control of Bank while Petitioner could acquire only the same share of Applicant (5.5 per cent) that she now holds in Bank. Based on the materials submitted by Petitioner, there appears to be no basis for concluding that Principals' tender offer breached their fiduciary duty to minority shareholders of Bank. Controlling shareholders of a corporation who exercise that control to form a holding company for the corporation may have some duty to protect the interests of minority shareholders. See Jones v. H. F. Ahmanson & Co., 81 Cal Rptr. 592, 460 P.2d 464 (1969). The controlling

shareholders may satisfy this duty by permitting minority shareholders to exchange their stock on an equal basis or by making a fair cash offer for the minority shares. Id. Here Principals have made a cash offer for minority shares that appears to be fair. Moreover, under the phantom merger agreement, shareholders who elect not to tender their shares would receive the same compensation per share as the controlling shareholders. Nothing in Petitioner's submissions indicates that the formation of the holding company would have a disproportionate impact on minority shareholders nor has Petitioner provided any authority demonstrating that Principals' conduct violates the fiduciary duties imposed under Texas law. The making of a tender offer by corporate insiders in itself does not appear necessarily to involve the use or abuse of a control position.

In addition, Petitioner's allegation concerning an alleged breach by Principals of a contract entered into by shareholders of Bank giving other shareholders a right of first refusal on shares held by the contracting shareholder does not appear to be supported by any persuasive evidence.

Petitioner's claim that Principals as a group and that one Principal, members of his immediate family, and corporations controlled by these family members are "companies" or "associations" within the meaning of the Bank Holding Company Act has been examined and determined to be without foundation. The Board has long recognized that Congress did not intend the Act to apply to individuals or groups of individuals who acquire control of a bank. The Board has

consistently taken the position that in order for a group to constitute a company or an association under the Act, there must be some evidence of a formalized structure binding the group together and perpetuating its existence.[3/] Because Petitioner has failed to produce any evidence of a formalized structure or agreement, such as an agreement concerning voting of shares, with respect to the groups involved, there is no basis for a determination that these groups will constitute a company or an association under the Act. Also without merit is Petitioner's claim that Principals violated section 11 of the Act by making a tender offer for Bank's outstanding shares shortly after Reserve Bank's

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3/ See American Security & Trust Co., 60 Federal Reserve Bulletin 875 (1974).

approval of the application, since principals did not propose to acquire any shares pursuant the tender offer until April 23, 1982, after the expiration of the 30 day statutory period. Finally, as explained above, Petitioner's claim that Applicant was required to give actual notice of the application is not persuasive. As noted above, the facts in the record indicate that Petitioner should have been on notice that the application would be filed. Moreover, any harm that Petitioner might have suffered from lack of actual notice has been obviated by the fact that her comments on the proposal have been given full consideration by the Board.

For the foregoing reasons, Petitioner's request for review of delegated action and request for a stay pending judicial review are denied.

Sincerely,

(signed) William W. Wiles

William W. Wiles
Secretary of the Board

APPENDIX II

Jolene GUSTAFSON, Petitioner,

v.

BOARD OF GOVERNORS OF
the FEDERAL RESERVE SYSTEM,
Respondent.

Nos. 82-4113, 82-4213.

United States Court of
Appeals, Fifth Circuit.

Oct. 17, 1983.

Minority shareholder in bank sought review of an order of the Federal Reserve bank of Dallas granting application of acquiring corporation for prior approval of its acquisition of bank. Shareholder also challenged decision of Board of Governors of the Federal Reserve system declining to set aside the Reserve bank's order. The Court of Appeals, Politz, Circuit Judge, held that notice by publication in general circulation newspaper of tender

offer for shares of bank and its connection with pending application to Federal Reserve bank for prior approval of bank holding company status for acquiring corporation satisfied procedural due process, despite minority shareholder's assertion that she was entitled to actual notice of proceedings; thus, minority shareholder's failure to participate in administrative proceedings would not be excused, and shareholder lacked standing to seek review of Reserve bank's order approving acquisition of bank.

Review denied.

1. Banks and Banking - 526

To qualify as an aggrieved party by virtue of order of Board of Governors of the Federal Reserve system, or a Reserve bank acting under delegated authority, and thus be able to seek judicial review

of order, a party must first pursue desired remedy in administrative forum. Bank Holding Company Act of 1956, § 9, as amended, 12 U.S.C.A. § 1848.

2. Banks and Banking - 526

Constitutional Law - 296(1)

Notice by publication in general circulation newspaper of tender offer for shares of bank and its connection with pending application to Federal Reserve bank for prior approval of bank holding company status for acquiring corporation satisfied procedural due process, despite minority shareholder's assertion that she was entitled to actual notice of proceedings; thus, minority shareholder's failure to participate in administrative proceedings would not be excused, and shareholder lacked standing to seek review of Reserve bank's order approving

acquisition of bank. Bank Holding Company Act of 1956, § 9, as amended, 12 U.S.C.A. § 1848.

Petitions for Review of an Order of the Board of Governors of the Federal Reserve System.

Before TUTTLE,* POLITZ and GARWOOD, Circuit Judges.

POLITZ, Circuit Judge:

Petitioner Jolene Gustafson, a minority shareholder of the Raymondville State Bank of Raymondville, Texas (Bank), seeks review of an order of the Federal Reserve Bank of Dallas (Reserve Bank) granting the application of Raymond State Bancshares, Inc. (Bancshares) for prior approval of its acquisition of the Bank under the Bank Holding company Act of 1956 (Act), as amended, 12 U.S.C. § 1842(a).[1] Also challenged is a decision of the Board of

Governors of the Federal Reserve System (Board) declining to set aside the Reserve Bank's order. Jurisdiction to consider both decisions is conferred upon this court by 12 U.S.C. § 1848. Having determined that petitioner is not an aggrieved party within the meaning of the Act, we affirm.

Factual and Procedural Background

This dispute is the product of a plan for the restructuring of the ownership interests in the Raymondville State Bank. The plan called for Bancshares to acquire all of the Bank's outstanding capital stock, pursuant to a merger between the latter and an interim bank to be chartered and wholly owned by Bancshares. John A. Calkins, Jack Funk, Ralph W. Hutchins, Charles B. Scott and James Whitfield (variously called "organizers" of "offerees"), who together held approximately 36% of the

Bank's stock and served on its board of directors, founded Bancshares for the express purpose of operating as a bank holding company, intending to exchange their shares in the Bank for shares in Bancshares, shifting the debt incurred in gaining control of the Bank to the newly-formed corporation. Because Bancshares would thus become a bank holding company under the Act, it was obliged to obtain the Board's approbation of the reorganization. Completion of the merger required the approval of the holders of at least two-thirds of the shares of the existing and interim banks, as well as the approval of a majority of their boards of directors.

Bancshares' five organizers planned to extend a tender offer, in their individual capacities, to all other Bank shareholders after Bancshares' section

3(a) application was granted. Each shareholder would be offered $100 per share in cash. The five organizers and any shareholder electing to forego participation in the offer would receive shares of Bancshares equal to the number of Bank shares held, coupled with $70 per share in Bancshares' assumption of indebtedness or issuance of subordinated 12 percent debentures. Dissenting shareholders were entitled to the appraised value of their stock. Since no "company" would acquire 25 percent or more of the Bank's shares under the tender offer, see 12 U.S.C. §§ 1841(a), 1842(a), Federal Reserve Board approval of this transaction was unnecessary.

Notices describing the impending acquisition of the Bank's stock which invited public comment, were published in the Raymondville Chronicle/News, a newspaper of general circulation, on

November 12 and 19, 1981. Bancshares applied to the Federal Reserve Bank of Dallas on December 1, 1981, for prior approval of its bank holding company status. See 12 C.F.R. § 265.2(f) (1982) (delegating to the federal reserve banks the authority to initially approve bank holding company applications). All components of the proposed merger, including the tender offer, were disclosed in the application. Later that month, the Reserve Bank requested, and was supplied, supplemental information relating to the merits of the application. On January 14, 1982, the Reserve Bank advised Bancshares by letter that its application was complete and was being forwarded to the Board for consideration. That same day, copies of the application were transmitted to the Federal Deposit Insurance Corporation and the Texas Banking Commissioner.[2]

A notice of the proposed tender offer was published in the Raymondville Chronicle/News on January 28, 1982. The offer was also discussed at the Bank's annual shareholders' meeting on January 28, 1982, in which Gustafson participated by proxy.

In accordance with its regulations, 12 C.F.R. § 262.3(l), the Board published notice of Bancshares' pending application in the Federal Register, 47 Fed.Reg. 4340 (1982), soliciting public comments and requests for hearing, which were to be submitted no later than February 21, 1982. Acting on the Board's notification of nonobjection, the Reserve Bank issued an order approving the application on February 26, 1982. Under 12 U.S.C. § 1849(b) and 12 C.F.R. § 262.3(j)(l)(i), the acquisition could not be concluded before the 30th day following the

order's effective date, or April 21, 1982.

Documents outlining the putative tender offer and formation of the holding company were mailed to the Bank's shareholders on March 3, 1982. During March and April of 1982, 64 shareholders tendered a total of 38,448 shares to the five organizers. Shares thus tendered were accepted on the prescribed closing date for the offer, April 23, 1982, and were ultimately purchased on June 1, 1982. At a special shareholder's meeting called on June 22, 1982, the shareholders assented to the merger by a vote of 86% of the outstanding shares to 0%, with 14% abstaining. Although Gustafson attended the meeting, she abstained from either voting or exercising her dissenter's rights.

Gustafson, who with 11.31% of the Bank's stock was its fourth largest shareholder,[3] first protested the Reserve Bank's approval of Bancshares' application by written petition to the Board dated March 1, 1982. Focusing on the tender offer rather than the merger, petitioner complained of the unfairness inherent in the organizers' exclusion of herself and her fellow minority shareholders from equal participation, as purchasers, in the bank holding company. Notwithstanding her broad invocation of the rights of minority shareholders, petitioner's objections were primarily based on the fact that she was not invited to join the quinary offerees. Her failure to attack the offer in the administrative proceedings was attributed to a claimed inadequacy of the published notice. For this and various other reasons, Gustafson

requested that the Board vacate the Reserve Bank's February 26 order, and either remand or deny Bancshares' application.

By letter dated May 10, 1982, the Board denied Gustafson's petition for review of the Reserve Bank's order, and declined to stay the order pending judicial review. Having determined that notices published in the local newspaper and Federal Register were constitutionally sufficient, the Board opined that petitioner's failure to contest the application during the prescribed comment period deprived her of standing to challenge the order.

Proceeding nonetheless to the merits of Gustafson's objections, the Board found, as a threshold matter, that its authority to entertain complaints of minority shareholders against management was confined by § 1842(c) to an

assessment of "conduct by managerial personnel toward [such] shareholders that reflects on the integrity of management." Applying this limited analysis, the Board found the terms of the tender offer and merger to be fair to the Bank's minority shareholders. The offerees thus fulfilled their fiduciary duties under Texas law. The Board rejected Gustafson's contention that the organizers together, as well as Funk alone, along with members of his immediate family and family-controlled corporations, constituted illegal bank holding companies, concluding that individual shareholders did not fall within the Act's definition of "company" absent evidence of a formalized structure or agreement. No such structure or agreement was shown. Finally, the Board found that because the March 3 tender offer could not be

finalized until April 23, 1982, subsequent to the expiration of the 30-day waiting period imposed by the Reserve Bank, the offer was conducted in conformity with the Act.

This consolidated appeal involves two petitions for review. The first, No. 82-4113, assigns error to the Reserve Bank's February 26, 1982 order granting Bancshares' section 3(a) application. In the second petition, No. 82-4213, Gustafson appeals from the Board's May 10, 1982 letter denying her request for review and for a stay of the Reserve Bank's February 26 order.

Legal Analysis

[1] Only those parties "aggrieved" by an order of the Board, or a Reserve Bank acting under delegated authority, amy seek judicial review in this court. 12 U.S.C. § 1848.[4] To qualify as an aggrieved party, a party must first

pursue the desired remedy in the administrative forum. Blackstone Valley Nat'l Bank v. Board of Governors, 537 F.2d 1146 (1st Cir. 1976); Bank of Commerce v. Board of Governors, 513 F.2d 164 (10th Cir. 1975); First Nat. Bank of St. Charles v. Board of Governors, 509 F.2d 1004 (8th Cir. 1975). See Whitney Nat. Bank v. Bank of New Orleans, 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed.2d 386 (1965). Under its regulations, the Board need not address objections to any proposal raised after permission to form a bank holding company is granted. 12 C.F.R. § 262.3(e). Arguing that an exception to this general principle should be made in her case, Gustafson maintains that her failure to interpose formal objections during the administrative process must be excused in light of the constitutionally deficient notice.

As previously noted, Bancshares published notice of the filing of its section 3(a) application in the Raymondville Chronicle/News on November 12 and 19, 1981, in compliance with 12 C.F.R. § 262.3(b). The Board in turn satisfied its regulatory obligation through publication of notice of the bank holding company application in the January 29, 1982 edition of the Federal Register. 12 C.F.R. § 262.3(i)(1). Notice of the tender offer and its connection with the pending application was published on January 28, 1982, in the Raymondville newspaper and it was announced at the Bank's annual shareholders' meeting. There being no dispute that the constructive notice demanded by Board regulations was provided, the dispositive issue is whether procedural due process compels actual notice of Board proceedings. If

not, petitioner's inaction effectively deprives her of standing to challenge the Reserve Bank's February 26 order.

While conceding that the Constitution does not impose a general requirement that all minority shareholders be personally notified of the application, Gustafson takes the position that because of the relationship of trust she had established with the five organizers, and their knowledge of her desire to join in the proposed tender offer as a purchaser, she was entitled to notice by mail. In her view, the offerees had reason to know of her "active and adverse interest" and hence should have timely advised her of the merger and attendant stock offering.

It is important at this juncture to emphasize the distinction, insofar as notice is concerned, between the merger

which culminated in the organization of the bank holding company and the tender offer by which the merger was implemented. Only the former is subject to the Board's regulatory notice provisions. Petitioner's complaint is directed against the organizers' alleged concealment of the offer. Actual notice of the application would have had no bearing on petitioner's essential complaint.

The examination of the legal sufficiency of the published notices must be made with this distinction in mind. The adequacy of the contents of these notices is not in issue. And, as recently observed, "[where] the contents of the published notice are otherwise complete, it is well settled that publications in the Federal Register are deemed legally sufficient notice to all interested persons." North Alabama

Express, Inc. v. United States, 585 F.2d 783, 787 n. 2 (5th Cir. 1978) (citations omitted). See 44 U.S.C. § 1058; Bank of Commerce v. Board of Governors.

In Bank of Commerce v. Board of Governors, the Tenth Circuit upheld the Board's repudiation of a similar due process challenge leveled by potential competitors of an applicant seeking to become a bank holding company under the Act. Despite Congress' conferral of standing upon such competitors in 12 U.S.C. § 1850, our colleagues ruled that actual notice of the filing of the application was not commanded by the due process clause where the Board had published the necessary information in the Federal Register.[5] Gustafson, as a shareholder, and not the statutorily designated recipient of a congressional grant of automatic standing, enjoys no greater right.

Another factor persuades us of the propriety of the Board's judgment that notice by publication conformed to the standards of procedural due process. Petitioner was cognizant of facts which should have signalled the pendency of a § 3(a) application. At some point during the summer of 1981, she had discussed with one or more of the organizers the feasibility of transferring ownership of the Bank to a bank holding company under a tender offer. A similar offer was announced at a shareholders' meeting almost one month before the Reserve Bank acted on Bancshares' application. Gustafson chose not to attend that meeting and gave her proxy to Jack Funk.[6] Though her absence does not imply a waiver of any claim, it illustrates petitioner's ready access to vital information. Moreover, she was represented by counsel

familiar with the administrative mechanisms to which an aspiring bank holding company, and any party protesting its application, were required to resort. Given this combination of circumstances, we cannot disagree with the Board's determination that petitioner was under a duty to inquire further into the status of Bancshares' proposal. See Bank of Commerce v. Board of Governors.

[2] Our conclusion that the published notices pass constitutional muster, and thus foreclose judicial review, leads us to the crux of petitioner's complaint--the organizers' ostensible dereliction of a fiduciary duty to consult her before executing the tender offer. Whatever the merits of this assertion under state law, it has no bearing on the sufficiency of the

notice pertaining to Bancshares' filing of a § 3(a) proposal. Nothing in the record suggests that the Board had knowledge of petitioner's reliance on any of the five organizers during the comment period, or was obliged for some reason to ignore the dictates of its own regulations and instruct Bancshares to furnish individual notice to petitioner. Nor does federal statutory or constitutional law impose any greater duty on Bancshares. We express no opinion about the existence or viability of any cause of action against the former Bank's directors which might lie under Texas law.

Inasmuch as the notice by publication provided in this case satisfied due process requirements, we concur in the Board's determination that petitioner's failure to participate in the administrative proceedings is not to

be excused. It follows that petitioner lacks standing under 12 U.S.C. § 1848 to seek review of the Reserve Bank's order approving Bancshares' acquisition of the Bank. We therefore need not address petitioner's attack on the Board's disposition of other substantive claims urged by petitioner. As to both petitions, therefore, review is DENIED.

---

[1] Section (a) of 12 U.S.C. § 1842 provides in pertinent part:

> It shall be unlawful, except with prior approval of the Board [of Governors of the Federal Reserve System]. . . (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank. . . .

A "bank holding company" is defined under the Act as "any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of [the Act]," 12 U.S.C. § 1841(a)(1). A company "controls" a bank or a bank holding company if it:

> (A) ... directly or indirectly or acting through one or more other persons owns, controls, or has

> power to vote 25 per centum or more of any class of voting securities of the bank or company; [or]
> (B) ... controls in any manner the election of a majority of the directors or trustees of the bank or company.

12 U.S.C. § 1841(a)(2).

[2] By letter dated January 29, 1982, Texas' Deputy Banking Commissioner informed the Board that he had no views or recommendations to offer. Action on Bancshares' application for FDIC approval has been deferred by that body pending the outcome of this appeal.

[3] Gustafson owned or controlled 5.5% of the Bank's stock, and was its fourth largest shareholder, prior to the extension of the tender offer. Since that time, she has more than doubled her holdings through the purchase of a block of 4,650 shares. As a result of this purchase she now holds 11.31% of the Bank's stock, and remains its fourth largest shareholder.

[4] Section 1848 permits:

> [a]ny party aggrieved by an order of the Board ... [to] obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by filing in the court, within thirty days after the entry of the Board's order, a petition praying that the order of the Board be set aside.

[5] Citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), and its progeny, the competitors asserted that notice by publication was deficient as to known adverse parties. In summarily disposing of this assertion, the Tenth Circuit reasoned:

> Mullane holds that due process requires notice which is calculated to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. This was publication in a local newspaper of a notice to settle accounts in an estate matter. Other cases are cited [pertaining to direct deprivations of tangible property] . . . but none . . . are in point

> either since they do not involve publication in the Federal Register and are not concerned with administrative proceedings.

Bank of Commerce v. Board of Governors, 513 F.2d at 166 (footnotes omitted). We concur in this reasoning, noting that were we to accept petitioner's proposition that the Board should compel all corporate applicants to notify by mail the shareholders of a target bank of an imminent acquisition, the negative repercussions would be immeasurable. First, it would be virtually impossible to ascertain which shareholders possessed the "adverse and active interest" postulated by petitioner. Second, the costs to the applicant of such a generalized notice requirement would in most instances be prohibitive, placing it beyond "the limits of practicality." Mullane v. Central

Hanover Bank & Trust Co., 339 U.S. at 318, 70 S.Ct. at 659.

[6] A stockholder is chargeable, under general corporate law, with notice of what transpires "at a meeting at which he is presented by proxy, and of matters reported thereto." 5 Fletcher Cyclopedia of Corporations, § 2061 at 255 (Perm. ed. 1975). Accord Trinity Universal Ins. Co. v. Maxwell, 101 S.W.2d 606 (Tex. Civ. App. 1937), writ dismissed.

APPENDIX III

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOLENE GUSTAFSON,

Pettiioner,

versus

BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,

Respondent.

Petitions for Review of an Order
of the Board of Governors of
the Federal Reserve System

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 17, 5 Cir., 1983, _____F.2d_____)
(November 17, 1983)

Before TUTTLE, POLITZ and GARWOOD, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled

on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing en Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz

United States Circuit Judge

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In The

Supreme Court of the United States

OCTOBER TERM, 1983

NO.

JOLENE GUSTAFSON,

Petitioner

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent

RESPONSE OF RAYMONDVILLE STATE BANCSHARES, INC., INTERVENOR, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Board of Governors is not reported. The panel opinion of the Fifth Circuit is reported at 717 F.2d 242 (1983), and the opinion denying rehearing and rehearing en banc is reported at 720 F.2d 1291 (1983).

JURISDICTION

The Court of Appeals for the Fifth Circuit, as shown below, lacked jurisdiction under 12 U.S.C. § 1848 to review the order of the Board of Governors of the Federal Reserve System, and that court so held. This Court has jurisdiction, under 28 U.S.C. § 1254(1), to review that decision of the Court of Appeals.

QUESTION PRESENTED

Did the Court of Appeals for the Fifth Circuit correctly hold that Petitioner was not a "party aggrieved" within the meaning of 12 U.S.C. § 1848 and was therefore not entitled to judicial review of the order of the Board of Governors of the Federal Reserve System approving Intervenor's application to become a bank holding company?

STATEMENT OF THE CASE

(1) Course of Proceedings and Disposition in the Forum Below

On December 1, 1981, Raymondville State Bancshares, Inc., the Intervenor in the judicial proceedings below, filed an application with Respondent for prior approval of action to become a bank holding company, pursuant to the provisions of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841-1850 (the "Bank Holding Company Act"). The application contemplated the acquisition of all the outstanding shares of capital stock of Raymondville State Bank (the "Bank"), by means of an interim bank merger. On February 26, 1982, the Federal Reserve Bank of Dallas, acting on delegated authority, approved the application. As provided by the Bank Holding Company Act, the approval became final on April 21, 1982.

On March 1, 1982, Petitioner filed a petition with Respondent seeking review of the approval order of February 26, 1982. She alleged that the related but independent tender offer for all of the outstanding shares of stock of the Bank, announced by John A. Calkins, Jack Funk, Ralph W. Hutchins, Charles B. Scott, and James Whitfield (the "Principals" of Intervenor), together with certain of their

family members and related business entities (collectively, the "Majority Shareholders"), was unfair to the minority shareholders. On May 10, 1982, Respondent affirmed the approval of Intervenor's application and denied Petitioner's request for review, in an opinion which held that Petitioner lacked standing to raise her objections, but which nonetheless examined and discussed Petitioner's substantive arguments and found them to be meritless.

During the pendency of the proceedings before Respondent, Petitioner sought review by the Court of Appeals. On March 11, 1982, she requested a temporary restraining order prohibiting the Majority Shareholders from purchasing any shares tendered in the tender offer. That petition was denied the same day. On March 26, 1982, she petitioned the Court of Appeals to review the February 26 approval order of the Federal Reserve Bank of Dallas. On April 16, 1982, she filed a petition for a stay of the effectiveness of the approval order and an injunction prohibiting the Majority Shareholders from purchasing the tendered shares. On April 21, 1982, the Court of Appeals granted that petition to the extent that it sought a stay of the February 26 approval order. That same day, Petitioner filed a motion to enlarge that stay such that it would contain a prohibition on the Majority Shareholders' purchase of the tendered shares. On April 22, 1982, the Court of Appeals denied the motion to enlarge the stay and dissolved the stay entirely. Also on April 21, 1982, Intervenor filed its motion for permission to intervene in and be a party to the proceedings in the Court of Appeals, and an order granting such permission was entered on May 10, 1982. On June 4, 1982, following Respondent's decision of May 10, 1982, upholding the approval of Intervenor's application, Petitioner filed a petition with the Court of Appeals for review of that order

and a motion to consolidate the two causes. On June 11, 1982, the Court of Appeals issued a consolidation order.

On October 17, 1983, the Court of Appeals denied Petitioner's request for review, holding that she lacked standing due to her failure to participate in the administrative proceedings precedent to Respondent's approval of Intervenor's application. On October 31, 1983, Petitioner petitioned for rehearing by the Court of Appeals and made a suggestion for rehearing en banc. Those requests were denied on November 17, 1983.

(2) Statement of Facts.

Intervenor's application filed with Respondent proposed that Intervenor would acquire one hundred percent of the outstanding stock of the Bank, pursuant to a merger between an interim bank, chartered and wholly owned by Intervenor, and the Bank. The merger transaction was subject to various regulatory approvals and to the approvals of two-thirds of the shareholders of both banks and a majority of the directors of both banks. Although the proposed tender offer did not require the prior approval of Respondent or any other regulatory agency, state or federal, the application did contain full disclosure that the Majority Shareholders intended to make a tender offer for the purchase of up to one hundred percent of the outstanding stock of the Bank.

Notice of the proposed tender offer was published in the *Raymondville News/Chronicle* on January 28, 1982, in accordance with the Texas tender offer guidelines which required at least twenty-one days' notice of a tender offer. The tender offer documents were mailed to the shareholders of the Bank, including Petitioner, on March 3, 1982. The offer contained a description of the proposed holding company formation, so that each shareholder had an oppor-

tunity to decide whether to sell his or her shares or to become a shareholder of the holding company when its acquisition of the Bank stock was consummated. Sixty-four shareholders tendered a total of 38,448 shares (out of a total of 80,000 shares outstanding), reducing the number of shareholders from eighty-seven to twenty-two. In accordance with the terms of the offer contained in the documents mailed to the shareholders, the Majority Shareholders accepted the tendered shares on April 23, 1982. They purchased those shares on June 1, 1982.

Prior to this controversy, Petitioner controlled 4,400 shares, 1,000 in her own name and 3,400 owned by the estate of her late husband, giving her 5.5 percent of the stock of the Bank and making her the fourth largest shareholder. During the pendency of the Majority Shareholders' tender offer, Petitioner's counsel wrote a letter to the shareholders of the Bank, asking that they not sell to the Majority Shareholders. In response to that letter one shareholder sold 4,650 shares to Petitioner, raising her total to 9,050 shares, or 11.31 percent of the stock of the Bank. Prior to the tender offer, the Principals and other Majority Shareholders controlled blocks of shares ranging from 1.0 percent to 10.95 percent. Following the purchase of the tendered shares, their holdings ranged from 2.34 percent to 25.58 percent. Petitioner, despite her claim that the Principals' actions changed her position, remained the fourth largest shareholder of the Bank.

On June 22, 1982, a special meeting of the shareholders of the Bank was held to consider and vote on the merger transaction. Petitioner attended the meeting and abstained from voting, but did not exercise her dissenters' rights to object to the merger. The shareholders voted, 86 percent to 0 percent, with 14 percent abstaining, to approve the merger.

Following receipt of the approvals of the Federal Deposit Insurance Corporation and the Texas Banking Commissioner, in both cases following an unsuccessful challenge by Petitioner, the merger was consummated on December 31, 1982.

ARGUMENT

Petitioner's complaint is chiefly directed at the tender offer made by the Majority Shareholders. Petitioner contends that the Principals, because they are directors of the Bank, had a duty to refrain from attempting to increase their individual stock holdings by means of a tender offer made to all other shareholders of the Bank. Although no regulatory approval was required for the Majority Shareholders to make the tender offer, Petitioner has attempted to challenge the fairness of the tender offer indirectly, by seeking judicial review of Respondent's order approving Intervenor's acquisition of the Bank.

The court below correctly held that Petitioner was not entitled to such review. The Bank Holding Company Act, at 12 U.S.C. § 1848, provides that a "party aggrieved" by an order of the Federal Reserve Board may obtain a review of such order. In order to have been a "party aggrieved," Petitioner must have participated in the administrative proceedings prior to the issuance of Respondent's order. The record shows, and Petitioner does not dispute, that she failed to participate in the administrative proceedings leading to the Board's order.

Petitioner argues that the requirement of participation in the prior administrative proceedings should be inapplicable to her, and to her alone, because she did not receive actual notice of the pendency of Intervenor's holding company application. She asserts that, with respect to her, actual notice was the minimum required by due process considera-

tions. This argument is fundamentally deficient, because the Court below did not hold, as Petitioner asserts that it held, that "property can be taken in administrative proceedings without affording due process." (Petition, page 2). Petitioner was not deprived of any property or liberty interest. Despite repeated references in her petition to having her "shares taken," she remains the owner of exactly the same number of shares and the same percentage of total outstanding shares before and after the Principals purchased the additional stock pursuant to the tender offer. She became a shareholder of the holding company, following consummation of the merger, and holds exactly the same number of shares and percentage of holding company stock as she did bank stock immediately prior to the merger. Her ownership position has been unaffected by the tender offer and was affected by the merger on exactly the same basis as were the holdings of every other shareholder. Due process, and its constituent element, notice, is not a right that must be accorded in the abstract. Rather, notice is necessary before an individual is deprived by governmental authority of a liberty or property interest. Petitioner has not been so deprived.

Furthermore, actual notice of the pendency of Respondent's Application would have been irrelevant to Petitioner's fundamental claim. Petitioner asserts that publication in the Raymondville newspaper and in the *Federal Register* was inadequate, but she has never challenged the content of that notice. The notice addressed the filing of the application to become a bank holding company, but did not in any manner allude to the fact that certain shareholders of the Bank would be making a tender offer. Petitioner has not shown that actual receipt of notice concerning the filing of the holding company application would have altered her ability to raise her objections to the tender offer.

CONCLUSION

Petitioner was not deprived of any constitutionally protected interest, and thus no greater notice than was given was constitutionally required. Petitioner's failure to appear in administrative proceedings before Respondent should not be excused. The court below was correct in holding that Petitioner was not a "part aggrieved" and therefore not entitled to judicial review of Respondent's order. For the foregoing reasons, Intervenor respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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No. .....

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BOARD OF GOVERNORS
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Respondent.

PROOF OF MAILING — AFFIDAVIT

I, Louis J. Weber, one of the attorneys for Raymondville State Bancshares, Inc., intervenor herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 15th day of March, 1984, I deposited in a United States mailbox, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Response of Intervenor.

Louis J. Weber

Subscribed and sworn to before me, at Dallas, Texas, this ..... day of January, 1984.

Notary Public in and for
the State of Texas

My commission expires:

AFFIDAVIT OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Intervenor was served on the petitioner's counsel of record, by depositing same in a United States mailbox, with first class postage prepaid, on this fifteenth day of March, 1984, to the following parties at the addresses shown:

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Respectfully submitted,

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By: _____

Subscribed and sworn to before me, at Dallas, Texas, this ..... day of March, 1984.

_____
Notary Public in and
for the State of Texas

My commission expires:

_____

END OF DOCKET